92-637

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

MUTUAL REINSURANCE BUREAU,

Petitioner,

v.

GREAT PLAINS MUTUAL INSURANCE COMPANY, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is a State arbitration statute, such as Kansas Statutes Annotated § 5-401, a law enacted by a State for the purpose of regulating the business of insurance within the meaning of the McCarran-Ferguson Act?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are:

Mutual Reinsurance Bureau, claimant-appellee, petitioner

and

Great Plains Mutual Insurance Company, Inc., respondent-appellant, respondent

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No. _____

In The

Supreme Court of the United States

October Term, 1992

MUTUAL REINSURANCE BUREAU,

Petitioner,

v.

GREAT PLAINS MUTUAL
INSURANCE COMPANY, INC.,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Mutual Reinsurance Bureau ("Mutual") respectfully prays that this Court issue a writ of certiorari to review the opinion entered by the United States Court of Appeals for the 10th Circuit on July 13, 1992.

OFFICIAL AND UNOFFICIAL REPORTS OF OTHER COURTS

1. Judgment and Memorandum Opinion; United States Court of Appeals for the 10th Circuit; July 13, 1992; 969 F.2d 931
2. Memorandum and Order; United States District Court for the District of Kansas; October 11, 1990
3. Memorandum and Order; United States District Court for the District of Kansas; March 8, 1991
4. Order denying Petition for Rehearing and denying Suggestion for Rehearing *En Banc*; United States Court of Appeals for the Tenth Circuit; August 11, 1992

JURISDICTION OF THIS COURT

This is a Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit. The judgment for which Mutual seeks review was entered on July 13, 1992, with the memorandum decision being filed that same date. On July 24, 1992, Mutual timely served a Petition for Rehearing and Suggestion for Rehearing *En Banc*. By order filed August 11, 1992, the court denied the Petition for Rehearing and also denied the Suggestion for Rehearing *En Banc*.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1), which provides in relevant part:

> Cases in the courts of appeals may be reviewed by the Supreme Court by . . . writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . .

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This Petition for a Writ of Certiorari involves two federal statutes and one State statute. The first federal statute is 15 U.S.C. § 1012(b), a provision of the McCarran-Ferguson Act, which provides as follows:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State Law.

The second relevant federal statute is 9 U.S.C. § 2, a component of the Federal Arbitration Act, which validates arbitration clauses in contracts:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or any agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

The relevant Kansas statute is K.S.A. § 5-401, which is a provision of Kansas' adaptation of the Uniform Arbitration Act:

> (a) A written agreement to submit any existing controversy to arbitration is valid, enforceable and irrevocable except upon such grounds as exist at law or in equity for the revocation of any contract.
>
> (b) Except as provided in subsection (c), a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable except upon such grounds as exist at law or in equity for the revocation of any contract.
>
> (c) The provisions of subsection (b) shall not apply to: (1) Contracts of insurance; (2) contracts between an employer and employees, or their respective representatives; or (3) any provision of a contract providing for arbitration of a claim in tort.

STATEMENT OF THE CASE

This case arises out of a First Excess Catastrophe Reinsurance Agreement ("Reinsurance Agreement") entered into by Mutual and Great Plains Mutual Insurance Company, Inc. ("Great Plains"). Mutual agreed to reinsure Great Plains with respect to certain liability accruing as a result of occurrences during the term of the

Reinsurance Agreement. With respect to any one occurrence, Great Plains was responsible for a $150,000 deductible. The Reinsurance Agreement also provided for mandatory arbitration:

> In case of any dispute arising between the parties hereto with respect to any transaction under this agreement, either party may request in writing that the dispute be referred to arbitration . . . .

On August 17, 1987, a storm struck Kansas and caused damage to property insured by Great Plains. On August 19, 1987, Kansas was struck by the same or a different storm which again damaged property insured by Great Plains. A dispute then arose between Mutual and Great Plains regarding the amount which Great Plains was entitled to recover from Mutual. Great Plains claimed that the two storms were one occurrence and that it was only responsible for one $150,000 deductible. Mutual, on the other hand, asserted that the storms were separate occurrences and that Great Plains was responsible for two $150,000 deductibles.

On January 4, 1988, Mutual wrote to Great Plains indicating that it intended to send the dispute to arbitration pursuant to the terms of the Reinsurance Agreement. Great Plains refused to participate in arbitration, however, asserting that the arbitration clause was unenforceable. Following a hearing, the arbitrators found that the August 17 and August 19, 1987 storms were the result of separate storm systems and therefore constituted two occurrences. Accordingly, the arbitrators ruled that Mutual was entitled to reimbursement of $142,500 which had been conditionally paid to Great Plains.

After Great Plains refused to comply with the arbitrators' award, Mutual filed suit in the United States District Court for the District of Kansas to obtain a confirmation of the arbitration award. The district court had jurisdiction under 9 U.S.C. § 4 and 28 U.S.C. § 1332 and entered judgment for Mutual. Great Plains then appealed.

In a Memorandum Decision filed on July 13, 1992, the United States Court of Appeals for the Tenth Circuit reversed the judgment of the district court, holding that the arbitration clause in the Reinsurance Agreement was unenforceable under K.S.A. 5-401(c)(1) and § 1012 of the McCarran-Ferguson Act. On July 24, 1992, Mutual served a Petition for Rehearing and a Suggestion for Rehearing *En Banc*, which were denied by the Court of Appeals by Order filed August 11, 1992.

REASONS FOR ALLOWANCE OF THIS WRIT

Supreme Court Rule 10.1 provides the general considerations used by the Court in determining whether to grant a petition for a writ of certiorari. The first consideration favoring review of this case is that the opinion of the Court of Appeals for the Tenth Circuit is in conflict with the decision of the United States Court of Appeals for the Second Circuit. In the case at bar, the Tenth Circuit held that the Kansas arbitration statute was a law enacted for the purpose of regulating the business of insurance, and the arbitration clause in the Reinsurance Agreement was therefore not enforceable under the Federal Arbitration Act. In *Hamilton Life Insurance Co. of New York v. Republic National Life Insurance Co.*, 408 F.2d 606 (2nd Cir.

1969), the Second Circuit reached a different result and concluded that the arbitration statutes of the States of New York and Texas were not statutes enacted for the purpose of regulating the business of insurance; rather, the Second Circuit found that these statutes regulated the handling of contract disputes generally. 408 F.2d at 611. Under the Second Circuit's holding, the arbitration clause in the Reinsurance Agreement would be enforceable under the Federal Arbitration Act. There is therefore a conflict between the Second and Tenth Circuits as to whether State arbitration statutes are laws enacted for the purpose of regulating the business of insurance, which in turn determines whether arbitration clauses in insurance and reinsurance agreements are enforceable under the Federal Arbitration Act.

This conflict between the Tenth and Second Circuits creates a burden on insurers and reinsurers doing business throughout the United States because the enforceability of arbitration clauses in their contracts will vary among the Circuits. For example, a reinsurer will have to litigate coverage disputes in the Tenth Circuit, while the same reinsurer will be able to seek arbitration in the Second Circuit. This uncertainty and inconsistency is likely to translate into increased costs for both the insurance industry and consumers because litigation is more expensive, and those additional costs will have to be factored into premiums.

The second consideration in favor of review in this case is that the Tenth Circuit has decided an important question of federal law which should be settled by this Court: Are State arbitration statutes enacted for the purpose of regulating the business of insurance within the

meaning of the McCarran-Ferguson Act? As of this date, approximately 35 states, including Kansas, have enacted the Uniform Arbitration Act. Uniform Arbitration Act (U.L.A. 1992 Supp.), p. 1. Many states have made changes to the official text, a number of which expressly refer to insurance. *Id.* at 2-3. The Tenth Circuit has held that the arbitration statutes of those states which make reference to insurance were enacted for the purpose of regulating the business of insurance and are therefore covered by the McCarran-Ferguson Act, while those statutes which do not make reference to insurance are not covered by the McCarran-Ferguson Act. Stated otherwise, the Tenth Circuit has held that whether an arbitration clause in a reinsurance agreement is enforceable under the Federal Arbitration Act depends on the wording of the applicable State arbitration statute. This conclusion has the potential to create a great deal of confusion and inconsistency in the application of the Federal Arbitration Act throughout the United States. As discussed above, this important question has great significance for the insurance industry and consumers alike.

For the above reasons, Mutual respectfully requests that the Court issue a writ of certiorari to review the

Memorandum Opinion of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IN THE MATTER OF THE ARBITRATION OF MUTUAL REINSURANCE BUREAU,	)	No. 91-3119 (D.C. No. 89-1187-C)
Claimant - Appellee,	)	
v.	)	
GREAT PLAINS MUTUAL INSURANCE COMPANY, INC.,	)	
Respondent - Appellant.	)	

JUDGMENT
Entered July 13, 1992
(Filed Aug. 21, 1992)

Before SEYMOUR, SETH, and ALDISERT*, Circuit Judges.

This cause came on to be heard on the record on appeal from the United States District Court for the District of Kansas and was submitted on the briefs at the direction of the court.

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* Honorable Ruggero J. Aldisert, United States Circuit Judge for the Third Circuit, sitting by designation.

Upon consideration whereof, it is ordered that the judgment of that court is reversed. The cause is remanded to the United States District Court for the District of Kansas for further proceedings in accordance with the opinion of this court.

Entered for the Court

ROBERT L. HOECKER, Clerk

By: /s/ Patrick Fisher
Patrick Fisher
Chief Deputy Clerk

A true copy

Teste

Robert L. Hoecker
Clerk, U. S. Court of
Appeals, Tenth Circuit

By

/s/ M. Talamas
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

91-3119

IN THE MATTER OF THE ARBITRATION OF MUTUAL REINSURANCE BUREAU, Claimant - Appellee, v. GREAT PLAINS MUTUAL INSURANCE COMPANY, INC., Respondent - Appellant.	)))))))))	On Appeal From The United States District Court For the District of Kansas (D.C. No. 89-1187-C) (Filed July 13, 1992)

Submitted on the briefs:

Norman R. Kelly of Norton, Wasserman, Jones & Kelly, Salina, Kansas, for Respondent-Appellant.

Clarence L. King, Jr. and Larry G. Michel of Hampton, Royce, Engleman & Nelson, Salina, Kansas, for Claimant-Appellee.

Before SEYMOUR, SETH, and ALDISERT*, Circuit Judges.

SETH, Circuit Judge.

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* Honorable Ruggero J. Aldisert, United States Circuit Judge for the Third Circuit, sitting by designation.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); Tenth Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

This appeal arose from a diversity action to enforce an arbitration award in accordance with the Federal Arbitration Act, 9 U.S.C. § 1. Appellant Great Plains Mutual Insurance Company appeals from an order of the District Court for the District of Kansas confirming an arbitration award in favor of Appellee Mutual Reinsurance Bureau. Appellant contends that an arbitration clause in a reinsurance agreement between it and Appellee is unenforceable under K.S.A. § 5-401 and the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015. We agree and reverse the decision of the district court.

In January of 1987, Appellant, a Kansas mutual insurance company, contracted with Appellee to reinsure certain losses that might be sustained by Appellant. Under the reinsurance agreement, Appellant was responsible for the first $150,000 of the net loss attributable to any one occurrence and Appellee was liable for amounts over $150,000 not to exceed $427,500. A clause in the reinsurance agreement provided that in case of a dispute between the parties, either party could submit the dispute to binding arbitration.

On August 17, 1987, Kansas was struck by a storm which caused damage to property insured by Appellant. On August 19, 1987, either that same storm or a different storm struck Kansas and damages property insured by

Appellant. Appellant made a claim against Appellee under the reinsurance agreement claiming that the storms of August 17 and 19 were one occurrence. Initially, Appellee made payments to Appellant totaling $275,401.09. These payments were made based on Appellee's position that the storms were separate occurrences. On December 1, 1987, Appellee notified Appellant that it was not waiving any of its rights under the reinsurance agreement. On January 4, 1988, Appellee sent a letter to Appellant announcing its intention to send the matter of whether the storms were one event or two to arbitration pursuant to the agreement.

The matter proceeded to arbitration under the terms set forth in the reinsurance agreement. Appellant refused to participate in the arbitration proceedings asserting that the arbitration clause in the reinsurance agreement was not enforceable under K.S.A. § 5-401. After an evidentiary hearing, the arbitrators found that the storms which passed through Kansas on August 17 and 19 were the result of separate storm systems and therefore were separate occurrences. The arbitrators also ruled that because Appellee's payments were conditional, Appellee was entitled to reimbursement of $142,500 that it had overpaid Appellant.

Appellant refused to pay the award contending it was void and unenforceable. Federal jurisdiction existed independently and Appellee filed suit in the United States District Court for Kansas pursuant to the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* (the "FAA"), to confirm the award of the arbitrator. The district court entered judgment for Appellee and this appeal followed.

Appellant contends that the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, precludes the application of the FAA to the reinsurance agreement. Appellant argues that the FAA would conflict with K.S.A. § 5-401 and, therefore, under the McCarran-Ferguson Act, K.S.A. § 5-401 controls.

The McCarran-Ferguson Act provides in part: "No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance. . . . " 15 U.S.C. § 1012(b). The district court held that K.S.A. § 5-401 did not regulate the "business of insurance" and, therefore, the FAA did not "invalidate, impair, or supersede" a law of the state of Kansas enacted for the purpose of regulating the "business of insurance."

Thus, the issue before us is whether K.S.A. § 5-401 is a law enacted for the purpose of regulating the "business of insurance" as that term is used in the McCarran-Ferguson Act. We hold that § 5-401 is a law enacted for the purpose of regulating the "business of insurance" and reverse the decision of the district court.

The version of K.S.A. § 5-401 in effect at the time the reinsurance agreement was executed provided:

> **"Validity of arbitration agreement.** A written agreement to submit any existing controversy to arbitration or a provision in a written contract, *other than a contract of insurance* . . . , to submit to arbitration any controversy, other than a claim in tort, thereafter arising between the parties is valid, enforceable and irrevocable. . . . "

(Emphasis added.)

The McCarran-Ferguson Act does not define "business of insurance" either in its text or in its legislative history. We are guided, however, by a trilogy of Supreme Court cases construing the term.

In the first of these three cases, Securities and Exch. Comm'n v. National Sec., 393 U.S. 453, 460, the Supreme Court emphasized that the relationship between the insurer and insured was of paramount importance in determining what constitutes the "business of insurance." The Court said:

> "The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement – these were the core of the 'business of insurance.' Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was – it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws governing the 'business of insurance.' "

Id.

Later, in Group Life and Health Ins. Co. v. Royal Drug, 440 U.S. 205, the Court again emphasized that Congress, in passing the McCarran-Ferguson Act, was primarily concerned with the relationship between the insurer and the insured. *Id.* at 215. The Court quoted from *National Securities* and noted that a common aspect of the "business of insurance" is the contract between the insurer and insured.

The Court's most recent opinion dealing with the "business of insurance" is Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119. After reviewing *National Securities* and *Royal Drug,* the Court identified three criteria relevant to determining whether a particular practice is part of the "business of insurance":

> "*first,* whether the practice has the effect of transferring or spreading a policyholder's risk; *second,* whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third,* whether the practice is limited to entities within the insurance industry. None of these criteria is necessarily determinative in itself. . . . "

Pireno, 458 U.S. at 129.

Reviewing K.S.A. § 5-401 in light of the Supreme Court's decisions in *National Securities, Royal Drug,* and *Pireno,* we must conclude that K.S.A. § 5-401 is a statute regulating the "business of insurance." We also conclude that this "business of insurance" includes reinsurance.

The criterion that was the focus in *National Securities* and *Royal Drug,* and to a lesser extent in *Pireno,* was "whether the practice is an integral part of the policy relationship between the insurer and the insured." We are mindful of the Supreme Court's statement in *National Securities* that statutes aimed at protecting the relationship between the insurance company and the policyholder "directly or indirectly, are laws regulating the 'business of insurance.' " *National Securities,* 393 U.S. at 460. Section 5-401 directly regulates the relationship between the insurance company and its policyholder by stating that an agreement between the two to arbitrate a

dispute is unenforceable. To expressly invalidate an agreement contained in the insurance contract touches the core of the "business of insurance" as explained in *National Securities. Id.*

With regard to the criterion identified in *Pireno* concerning the underwriting of risk, it should be noted that a contract of insurance is evidence of an agreement to spread risk. Section 5-401 has the effect of invalidating any arbitration provision included in such a contract. Simply put, the Kansas legislature has placed limits on the enforceability of an agreement to spread risk by enacting K.S.A. § 5-401.

The district court relied on our earlier decision in Hart v. Orion Ins. Co., 453 F.2d 1358 (10th Cir.), as well as the Second Circuit's decision in Hamilton Life Ins. Co. of N.Y. v. Republic Nat'l Life Ins. Co., 408 F.2d 606 (2d Cir.), for the proposition that state arbitration laws are not laws regulating the "business of insurance." The court then held that K.S.A. § 5-401 was a law governing arbitration generally and not a law regulating the "business of insurance." The statutes at issue in *Hart* and *Hamilton* differ from K.S.A. § 5-401 in one very important respect in that those statutes governed arbitration in general and did not mention "contracts of insurance." The trial court noted as to *Hart* that the statute there considered did not contain the exception "contracts of insurance," but apparently concluded that made no difference. Section 5-401 as it now exists expressly excludes contracts of insurance from arbitration and therefore it is not comparable to the statutes in *Hart* and *Hamilton*.

The district court also held that the FAA does not conflict with K.S.A. § 5-401 because § 5-401 does not apply to the reinsurance agreement. The court reasoned that § 5-401 does not apply to the reinsurance agreement because the reinsurance agreement is a "contract for insurance" and § 5-401 only applies to "contracts of insurance."

Thus, the district court found that the FAA does not invalidate, impair or supersede any law of the state of Kansas and does not run afoul of the McCarran-Ferguson Act. We cannot agree with the district court's distinction between a "contract of insurance" and a "contract for insurance."

In Security Mut. Casualty Co. v. Century Casualty Co., 531 F.2d 974 (10th Cir.), we distinguished between a "contract for insurance" and "contract of insurance." The distinction was helpful in that case to determine whether a notice provision in an insurance contract was a condition precedent. We noted that a reinsurance treaty is usually a contract for insurance, consisting of a bilateral agreement containing mutual covenants. *Id.* at 977. In contrast, a primary insurance contract, or a contract of insurance, is based on a condition and a promise and, therefore, is unilateral in nature. *Id.* This distinction was an important element in *Security Mutual* but is not useful here.

Moreover, it requires a strained interpretation of K.S.A. § 5-401 to reach the conclusion that the Kansas legislature intended to exclude reinsurance agreements by the use of the words "contract of insurance." To limit the term "contract of insurance" to primary insurance

contracts would make some of the statutes regulating insurance in Kansas meaningless. For example, K.S.A. § 40-201 titled "Insurance company defined" provides in part:

> "For the purposes of this article the term 'insurance company' shall, unless otherwise provided, apply to all corporations, companies, associations, societies, persons or partnerships writing *contracts of insurance*, indemnity, or suretyship upon any type of risk or loss. . . . "

(Emphasis added.)

Applying the interpretation of "contracts of insurance" urged by Appellee to § 40-201, a company engaged in the business of reinsurance in Kansas would not be considered an insurance company under the Kansas statutes because the legislature did not include the term "contract for insurance." We are not persuaded that the Kansas legislature intended to distinguish between primary insurance contracts and reinsurance contracts by use of a term such as "contract of insurance." Therefore, we hold that K.S.A. § 5-401 applies to reinsurance agreements as well as primary insurance contracts and the McCarran-Ferguson Act precludes the application of the FAA to the reinsurance agreement at issue here.

For the application of the McCarran-Ferguson Act it is not necessary, as the Appellee urges, that the state statute "regulate the business of insurance" be in the form of an insurance code or an act relating only to insurance. The application of the Kansas statute here concerned to insurance as an exception is clear and direct although included in an act relating basically to arbitration.

It is apparent that the Federal Arbitration Act is significant legislation to provide for the enforcement of arbitration agreements and to express an important policy favoring arbitration. *See* Dean Witter Reynolds v. Byrd, 470 U.S. 213. However, in our view the Kansas statute combined with the McCarran-Ferguson Act prevents its application.

Because we hold that the FAA does not apply to the reinsurance agreement here, we need not address the other contentions raised by Appellant in this appeal.

Accordingly, the judgment of the District Court for the District of Kansas is REVERSED and the case is REMANDED for proceedings consistent with this opinion.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

ENTERED ON THE DOCKET
DATE: 10-11-90

IN THE MATTER OF ARBITRATION
OF MUTUAL REINSURANCE
BUREAU,

Claimant,

Vs.

Case No.
89-1187-C

GREAT PLAINS MUTUAL
INSURANCE COMPANY, INC.,

Respondent.

MEMORANDUM AND ORDER
(Filed Oct. 11, 1990)

This diversity of citizenship case comes before the court upon claimant Mutual Reinsurance Bureau's (MRB) motion, pursuant to 9 U.S.C. § 9, seeking to confirm the arbitration award entered on December 13, 1988, in its favor and against respondent Great Plaints Mutual Insurance Company, Inc. (GPM).

MRB is an Illinois corporation which, at all times relevant to this matter, was the reinsurer for GPM. GPM is a general property casualty insurer; its principal place of business is Salina, Kansas.

MRB and GPM entered a reinsurance agreement entitled "First Excess Catastrophe Reinsurance Agreement #5 644." Under that agreement, GPM was responsible for the

first $150,000 of the ultimate net loss on any *one* occurrence. MRB was liable "for the amount by which such ultimate net loss exceeds" $150,000, but not to exceed $427,500 (95% of the $450,000) in regard to any one loss occurrence.

The agreement defined "loss occurrence" as "the sum of all individual losses directly occasioned by any one disaster, accident, or loss, or series of disasters, accidents, or losses arising out of one event which occurs within the area of one state of the United States . . . " When the loss entailed damage from wind, hail, or tornado, the duration and extent of any one loss occurrence was limited to "any period of 72 consecutive hours arising out of and directly occasioned by the same event." In the event of a dispute between the parties, the agreement contained an arbitration clause.

On August 17, 1987, Kansas was assailed by a storm. On August 19, 1987, either that same storm or another storm system struck Kansas. Those weather conditions damaged property insured by GPM. The damage was sufficient for GPM to make claims against MRB under the reinsurance agreement. Under the terms of the reinsurance agreement, a "one storm" theory favored GPM; a "two storm" theory favored MRB.

Pursuant to the reinsurance agreement, between October 9, 1987, and November 23, 1987, MRB made a series of payments to GPM totalling $275,401.09. On December 1, 1987, MRB sent a letter to GPM's attorney which stated, *inter alia*, that MRB was not waiving any of its rights under the reinsurance agreement. On January 4, 1988, MRB announced its intention to send the matter of

whether the one or two storms had caused the damage to arbitration. In two subsequent payments, MRB paid a total of $166,669.92 to GPM. MRB conditioned those payments upon the ultimate decision rendered by the arbitrators.

On February 26, 1988, MRB informed GPM that it was initiating the arbitration procedure as outlined in the reinsurance agreement. On March 7, 1988, GPM informed MRB that it "has not, does not and will not consent to arbitration." It was and remains GPM's position that K.S.A. 5-401 prohibits the enforceability of an arbitration clause in any "contract of insurance."

Pursuant to the agreement, arbitrators were chosen.[1] On October 21, 1988, an evidentiary hearing was conducted. The arbitration decision was journalized on December 13, 1988. Consistent with its March 7, 1988, letter, GPM took no part in the arbitration. GPM did not present evidence or otherwise participate in the arbitration evidentiary hearing.

The arbitration award was favorable to MRB. The arbitrators found that two storm systems had passed through Kansas on August 17 and August 19, 1987. The arbitrators also found that MRB's payments to GPM were

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[1] MRB contends, and GPM apparently concedes, that the arbitration clause of the agreement provided for the ex parte selection of arbitrators. Because GPM was not required to participate in the selection of the arbitrators, the arbitrators were authorized to proceed with the evidentiary hearing in GPM's absence. *See Standard Magnesium Corp. v. Fuchs*, 251 F.2d 455, 456-458 (10th Cir. 1957); *Corallo v. Merrick Cent. Carburetor, Inc.*, 733 F.2d 248, 250-251 (2nd Cir. 1984).

conditional. The arbitrators concluded that MRB had overpaid GPM by $142,500. Under the arbitration decision, MRB was awarded $142,500, 50% of the arbitration costs, plus interest if GPM failed to reimburse in the time allotted.

MRB seeks to confirm the arbitration order. GPM challenges the arbitration award on several grounds. The court, having reviewed the memoranda filed by each party, is now prepared to rule on the matter.

THE FEDERAL ARBITRATION ACT

The Federal Arbitration Act, 9 U.S.C. §§ 1-15, originally enacted in 1947, sets forth the general federal law relating to arbitration. "The Act was passed to ensure that courts would honor and enforce the contractual agreements of parties who choose to resolve their disputes through the informal process of arbitration." *Hartford Lloyd's Ins. Co. v. Teachworth,* 898 F.2d 1058, 1061 (5th Cir. 1990). The Act embodies the federal policy favoring arbitration agreements. " '[T]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered,' a concern which 'requires that we rigorously enforce private agreements to arbitrate.' " *Mitsubishi Motors v. Soler Chrysler-Plymouth,* 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985) (quoting *Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213, 221, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985).

The FAA is not an independent source of federal jurisdiction. "Under the FAA, federal jurisdiction is available only if otherwise available through some independent source such as 28 U.S.C. § 1331 or § 1332." *Mesa*

Oper. Ltd. Part. v. Louisiana Intrastate Gas, 797 F.2d 238, 240 (5th Cir. 1986); 9 U.S.C. § 4. Once federal jurisdiction is established, the FAA empowers the court, *inter alia*, to enter an order confirming the award. 9 U.S.C. § 9. Once an arbitration award has been rendered, the court may, under certain limited circumstances, vacate or modify the award. 9 U.S.C. §§ 10, 11.

THE MCCARRAN-FERGUSON ACT

Prior to the Supreme Court's decision in *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944), it was assumed that "insurance" was not a transaction in commerce. *See S.E.C. v. National Securities*, 393 U.S. 453, 458, 89 S.Ct. 564, 21 L.Ed.2d 668 (1969); R. Jerry II, *Understanding Insurance Law*, at 50-53 (1987). In response to that decision, Congress passed the McCarran-Ferguson Act. Section 1 of the Act contains the declaration of policy:

> The Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States. 15 U.S.C. § 1011.

The operative language of the Act is contained in section 2:

> (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business unless such Act specifically relates to the business of insurance . . . 15 U.S.C. § 1012.

Therefore, State laws regulating the "business of insurance" supersede federal laws that do not directly regulate the "business of insurance."

The phrase "business of insurance" is the key to determining whether federal law has been preempted by the states. The Act does not define "business of insurance." In *National Securities,* the Supreme Court commented:

> The statute did not purport to make the States supreme in regulating all the activities of insurance *companies;* its language refers not to the person or companies who are subject to state regulation, but to laws "regulating the *business* of insurance." Insurance companies may do many things which are subject to paramount federal regulation; only when they are engaged in the "business of insurance" does the statute apply." [sic] 393 U.S. at 459-60. (Emphasis in original).

The court went on to say:

> The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement – these were the core of the "business of insurance." Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed

> in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was – it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the "business of insurance." 393 U.S. at 60.

In *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205, 217, 99 S.Ct. 1067, 59 L.Ed.2d 261 (1979), the Court clarified the latter quote:

> "[E]very business decision made by an insurance company has some impact on its reliability, its ratemaking, and its status as a reliable insurer. The manager of an insurance company is not different from the manager of any enterprise with the responsibility to minimize costs and maximize profits. If terms such as "reliability" and "status as a reliable insurer" were to be interpreted in the broad sense urged by the petitioners, almost every business decision of an insurance company could be included in the "business of insurance." Such a result would be plainly contrary to the statutory language, which exempts the "business of insurance" and not the "business of insurance companies."

In *Union Labor Life Insurance Co. v. Pierno Co.*, 458 U.S. 119, 102 S.Ct. 3002, 73 L.Ed.2d 647 (1982), the Court refined and articulated the *Royal Drug* three-part test for determining whether an insurer's activity is within the "business of insurance." Three questions must be asked: (1) Does the insurer's activity involve the transferring or spreading of a policyholder's risk; (2) Is the insurer's

activity an integral part of the policy relationship between the insurer and the insured; (3) Is the activity limited to entities within the insurance industry? None of these criteria is necessarily determinative in itself. 458 U.S. at 127-129.

In summary, the McCarran-Ferguson Act declares that state law regulating the "business of insurance" controls over federal law not specifically relating to the "business of insurance." 15 U.S.C. § 1012.

ANALYSIS

MRB contends that the arbitration clause in the reinsurance agreement it entered with GPM is governed by the Federal Arbitration Act. Pursuant to that Act, MRB seeks to enforce the arbitration award. GPM's primary defense in this matter centers on the McCarran-Ferguson Act and the operation of K.S.A. 5-401.

K.S.A. 5-401, as it existed at the time the parties entered this agreement provided:

> A written agreement to submit any existing controversy to arbitration or a provision in a written contract, other than a *contract of insurance* or a contract between an employer and employees or between their respective representatives, to submit to arbitration any controversy, other than a claim in tort, thereafter arising between the parties is valid, enforceable and irrevocable,

> save upon such grounds as exist at law or in equity for the revocation of any contract.
>
> (Emphasis added.)[2]

No court has interpreted the meaning of "contract of insurance" found in K.S.A. 5-401.[3]

The sole issue is whether the Federal Arbitration Act invalidates, impairs, or supersedes K.S.A. 5-401. *See Miller v. National Fidelity Life Ins. Co.*, 588 F.2d 185, 187 (5th Cir. 1979) (the test under McCarran-Ferguson is not whether a state has enacted statutes regulating the business of insurance, but whether such state statutes will be invalidated, impaired, or superseded by application of federal law).

The court concludes that the FAA does not conflict with K.S.A. 5-401. Several reasons support this conclusion. Generally, state arbitration laws are not laws regulating the business of insurance.

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[2] The court notes that K.S.A. 5-401 was amended as of July 1, 1987. L. 1987, ch. 38, § 1. *See* K.S.A. 1990 Supp. 5-401. Presumably, this change would not affect the agreement between MRB and GPM which was entered prior to its effective date. In any event, this amendment effected no substantive change in the statute.

[3] GPM directs the court's attention to *NEA-Topeka v. U.S.D. No. 501*, 7 Kan. App. 2d 529, 644 P.2d 1006 (1982). In *NEA-Topeka*, the Kansas Court of Appeals found "the language of 5-401 to be plain and unambiguous and to exclude all contracts between an employer and employees, or between their respective representatives, whether in the public or private sector." *Id.* at 532. Therefore, the court of appeals did not consider the phrase "contract of insurance" found in K.S.A. 5-401. Thus, the court of appeals' analysis in *NEA-Topeka* is of little or no relevance to the case at bar.

Arbitration laws regulating the method of handling contract disputes generally are not laws regulating the business of insurance within the meaning of the McCarran Act. The Act does not preclude application of the Federal Arbitration Act as regards parties to a reinsurance agreement containing an arbitration clause.

2A G. Couch, *Couch on Insurance* 2d § 21:45, at 363 (Rev. ed 1984).

At least three appellate courts have considered the applicability of the FAA when the McCarran-Ferguson Act might arguably have prevented the operation and enforcement of arbitration clauses. In *Hart v. Orion Ins. Co.*, 453 F.2d 1358 (10th Cir. 1971), the insured contended that the McCarran-Ferguson Act prevented the arbitration of an occupational disability insurance policy. The Tenth Circuit concluded:

> None of the provisions of the Montana, Illinois, and Colorado statutes to which our attention has been called regulate the business of insurance. Instead, they are laws of general application pertaining to the method of handling of contract disputes . . . Accordingly, the McCarran-Ferguson Act does not bar the application of the Federal Arbitration Act and the arbitration provisions are enforceable in the case at bar.

453 F.2d at 1360.

In *Hamilton Life Insurance Co* [sic] *of New York v. Republic National Life Insurance Co.*, 291 F.Supp. 225 (S.D.N.Y. 1968), *aff'd* 408 F.2d 606, 611 (2nd Cir. 1969), the Second Circuit rejected a McCarran-Ferguson Act challenge to an arbitration clause. The court of appeals, affirming the district court, concluded that the state

arbitration laws were not statutes regulating the business of insurance, but were statutes handling contract disputes generally.[4] *Accord, Miller, supra,* 588 F.2d at 187 (following *Hart* and *Hamilton*).

K.S.A. 5-401 differs from the arbitration statutes considered in *Hart, Hamilton* and *Miller* in that it appears that none of the arbitration statutes considered in those cases contained the phrase "contracts of insurance."[5] K.S.A.

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[4] The district court also concluded that the McCarran-Ferguson Act did not empower a state to regulate interstate insurance practices which have their situs outside its borders. 291 F.Supp. at 232. As such, the court concluded that the application of the Texas Arbitration Statute to "prohibit the submission of this extraterritorial dispute to arbitration in New York City would not be 'regulation' within the meaning of 2(b) of the McCarran-Ferguson Act." *Id.*

[5] In *Hamilton,* the district court considered whether Texas law prevented arbitration of contracts of insurance.

> Respondent asserts that Article 224 of the present Texas Arbitration Statute is in direct conflict with the Federal Arbitration Act. This Texas provision renders enforceable written agreements to arbitrate future as well as existing disputes but provides that "none of the provisions of this Act shall apply to . . . any contract of insurance or any controversy thereunder." Title 10 Vernon's Ann. Civil Stats. Art. 224 (1967 Supp.) However, this provision is applicable only to arbitration agreements made after January 1, 1966 and, therefore, would not apply to the instant agreement, which was executed in September, 1965. Id. Art. 238-3 (1967 Supp.). *Hamilton,* 291 F. Supp. at 231-232.

Therefore, the district court in Hamilton did not confront the precise issue at bar. On appeal, the Second Circuit stated:

> "It is quite plain that arbitration statutes, including those of Texas and New York, are not statutes regulating the method of handling contract disputes gener-

5-401 specifically prevents arbitration of "contracts of insurance." The court concludes, however, K.S.A. 5-401 is inapplicable to the reinsurance agreement between GPM and MRB because that agreement is not a "contract of insurance" but is a "contract for insurance."

In *Security Mut. Cas. Co. v. Century Cas. Co.*, 531 F.2d 974 (10th Cir.), *cert. denied*, 429 U.S. 860 (1976), the court of appeals recognized and discussed the distinction between a reinsurance treaty and a contract of insurance.

> A primary insurance contract is essentially unilateral in nature. The entire relationship is based upon a promise and a condition. The insurer promises to pay a sum of money upon the happening of an uncertain and fortuitous event, conditioned upon the payment of premiums by the insured. The insured makes no return promise to pay the premiums and the other duties placed on the insured are usually stated as conditions rather than promises. 3A Corbin on Contracts § 731 (1960). . . .
>
> In contrast, a reinsurance treaty is a contract for insurance, not a contract or policy of insurance. 19 Couch on Insurance 2d § 80:2 (1965). In a reinsurance treaty, the reinsured contracts to cede all or part of its risks to the reinsurer. The reinsurer contracts to accept the risks in return for a portion of the premiums. 13 Appleman, Insurance Law and Practice (1965) § 7681 (1945). A treaty is a bilateral contract containing mutual covenants. Id. at 977.

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ally." 408 F.2d at 611. The court of appeals' opinion did not differentiate between the two versions of the Texas Arbitration Act.

The agreement between GPM and MRB is a reinsurance treaty and is therefore a "contract for insurance." GPM does not dispute that the agreement is a reinsurance treaty. GPM does, however, contend that the legislature intended the phrase to bar arbitration in *all* contracts involving insurance contracts. The court rejects GPM's interpretation. By its own terms, K.S.A. 5-401 only excludes arbitration of "contracts of insurance." A "contract of insurance" is not the same as a "contract for insurance."

It is presumed the legislature acted with full knowledge and information as to judicial decisions with respect to prior law. *See Szoboszlay v. Glessner,* 233 Kan. 475, 664 P.2d 1327 (1983). The differentiation between contracts of insurance and reinsurance treaties is a well-recognized distinction. *See, e.g. Pioneer Life Ins. Co. v. Alliance Life Ins. Co.,* 374 Ill. 576, 30 N.E.2d 66 (1940). Therefore, it is reasonable to believe that the legislature intended K.S.A. 5-401 to apply only to "contracts of insurance," i.e., contracts typically between the insurance company and the insured.

The result reached is consistent with the FAA, the McCarran-Ferguson Act, K.S.A. 5-401, and the agreement between GPM and MRB. In *Southland Corp. v. Keating,* 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984), the Supreme Court commented:

> In enacting § 2 of the federal [sic] Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.

After quoting the text of 9 U.S.C. § 2, the Court concluded:

> We discern only two limitations on the enforceability of arbitration provisions governed by the Federal Arbitration Act: they must be part of a written maritime contract or a contract "evidencing a transaction involving commerce" and such clauses may be revoked upon "grounds as exist at law or in equity for the revocation of any contract." We see nothing in the Act indicating that the broad principle of enforceability is subject to any additional limitations under state law. (Footnote omitted.)

465 U.S. at 10-11.

The pervasiveness of this policy favoring arbitration has influenced other courts in resolving potential conflicts between the FAA and the McCarran-Ferguson Act in favor of arbitration.

> At this juncture, we see no certain impairment of Texas insurance law which would trigger the McCarran Act or thwart arbitration. Therefore, we are swayed by the ponderous mandate which declares that doubts at [sic] to the availability of arbitration must be resolved in favor of arbitration.

Life of America Ins. Co. v. Aetna Life Ins. Co., 744 F.2d 409, 413 (5th Cir. 1984).

Because the FAA does not conflict with K.S.A. 5-401, the McCarran-Ferguson Act is not implicated. The court concludes that GPM and MRB are bound by their agreement to arbitrate.

INTERSTATE COMMERCE AND WAIVER

GPM raises two additional arguments in opposition to confirmation of the arbitration award. GPM contends that its agreement with MRB does not involve interstate commerce, thus making the FAA inapplicable. Alternatively, GPM contends that MRB's payments constitute a waiver of its right to arbitration. MRB responds that its agreement with GPM involved interstate commerce and that it did not waive its right to arbitration.

The court will address both of these arguments.

INTERSTATE COMMERCE

The FAA applies to written arbitration agreements involving maritime transactions or commerce. 9 U.S.C. § 2. Under the FAA, "commerce" means interstate commerce. 9 U.S.C. § 1. "[B]ecause of the strong policy favoring arbitration, the requirement of "evidencing a transaction involving commerce must be construed broadly." *Snyder v. Smith*, 736 F.2d 409, 417 (7th Cir.), *cert. denied*, 469 U.S. 1037 (1984). The FAA is not limited to the interstate shipment of goods; the Act applies to contracts relating to interstate commerce. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 401 n. 7, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967) (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924) [sic].

Since the Supreme Court's decision in *South-Eastern Underwriters* in 1944, there is no doubt that insurance is "commerce." Insurance conducted across state lines is therefore interstate commerce. *Ace Grain Co. v. American Eagle Fire Ins. Co. of New York*, 95 F.Supp. 784 (S.D.N.Y.

1951). In *Hart, supra,* 453 F.2d at 1360, the court of appeals recognized that interstate insurance transactions are subject to federal regulation under the commerce clause.

The next issue presented is whether the reinsurance agreement in the case at bar involves interstate commerce. In *Hamilton, supra,* the parties entered a reinsurance agreement. The reinsurance agreement was executed by the New York reinsurance company and then mailed to the insurance company for signature. The district court commented:

> It is uncontroverted that the agreement in issue satisfies the jurisdictional requirements of the Act. Section 2 of the Federal Arbitration Act, 9 U.S.C. § provides that a written arbitration provision 'in . . . a contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.' The agreement in issue involving interstate transactions between companies of different states is manifestly one "evidencing a transaction involving (interstate) commerce.' [sic] 291 F.Supp. at 229, n. 2.

In *Ainsworth v. Allstate Ins. Co.,* 634 F.Supp. 52, 55 (W.D.Mo. 1985), the court considered whether the reinsurance agreements in that case involved interstate commerce. In *Ainsworth,* the court noted that the fact that the agreement involved insurance may be enough to establish the interstate commerce connection. *Id.* at 55. The court found particularly persuasive the fact that part of the underlying casualty and liability insurance policies were at least in part negotiated in states other than Missouri. The court also noted that one of the insurance

companies' covered liability on out-of-state insureds. On those facts, concluded that "the reinsurance agreement was within the coverage of the FAA – that is, they touch on interstate commerce transactions." *Id.* at 56.

This court concludes that the reinsurance agreement between GPM and MRB involved interstate commerce. Several facts support this conclusion: (1) The parties to the reinsurance agreement were of diverse citizenship; (2) the [sic] contract was one involving reinsurance; (3) GPM states in its "Response to Petitioner's Motion for Order Confirming Arbitration Award," filed April 24, 1989, that it "contemplated *no substantial* interstate activity by either party in performance of the Agreement;" clearly, this is an admission that at least *some* interstate commerce was contemplated by the parties to the agreement; (4) The insurance treaty was apparently originally drafted in Illinois; the final version of the agreement was agreed to and signed in Kansas. [sic][6]; (5) MRB's representatives from Illinois personally travelled to Kansas to conduct business; (6) Business relating to the treaty was conducted by interstate telephone and interstate mail; (7) Payments made by GPM to MRB were made from Kansas banks and deposited in Illinois banks; payments make under the treaty agreement by MRB to GPM were paid from an Illinois bank; (8) All payments were made through interstate mail; (9) The agreement to arbitrate allowed each

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[6] Apparently, the reinsurance treaty was originally drafted in Illinois. GPM was given an opportunity to modify the agreement in Salina, Kansas. (Affidavit of Robert Monaghan). The affidavit supplied by GPM (Affidavit of C. L. Christian) states that the reinsurance treaty was "executed" on February 6, 1987, in Salina, Kansas.

party to select and submit the name of an arbitrator and the location of the arbitration evidentiary hearing.[7]

Although many aspects of the contract negotiation between the two parties transpired within the borders of the State of Kansas, the totality of facts compels the court to conclude that the reinsurance treaty between GPM and MRB was a contract involving interstate commerce.

WAIVER

GPM contends that MRB's payments waived MRB's right to arbitration. MRB responds that GPM cannot raise the waiver argument in this proceeding as this court's review of the arbitration order is limited by the FAA. Alternatively, MRB contends that none of its actions waived its right to arbitration.

"A confirmation proceeding under 9 U.S.C. § [sic] is intended to be summary: confirmation can only be denied if an award has been corrected, vacated, or modified in accordance with the Federal Arbitration Act." *Taylor v. Nelson,* 788 F.2d 220 (4th Cir. 1986). The statutory reasons for which the court may deny confirmation are very limited. "Only clear evidence of impropriety . . . justifies the denial of summary confirmation of an arbitration award." *Ormsbee Development Co. v. Grace,* 668 F.2d 1140, 1147 (10th Cir.), *cert. denied,* 459 U.S. 838 (1982). Section 10 provides that an arbitration award may be vacated in the following situations:

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[7] The arbitration evidentiary hearing was held in Kansas City, Missouri.

> (a) Where the award was procured by corruption, fraud, or undue means.
>
> (b) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; of any other misbehavior by which the rights of any party have been prejudiced.
>
> (d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
>
> (e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

9 U.S.C. § 10. Section 11 provides that an arbitration award may be modified or corrected in the following situations:

> (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
>
> (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
>
> (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

9 U.S.C. § 11.

Some courts have also recognized a non-statutory grounds for relief referred to as "the manifest disregard of the law standard." *See Drayer v. Krasner*, 572 F.2d 348 (2nd Cir.), *cert. denied*, 436 U.S. 948 (1978) (manifest disregard standard presupposes something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand or apply the law).

The arbitrators in this case concluded that MRB conditionally paid GPM: Under the limited authority granted this court under the FAA, that decision is not subject to vacation, modification or correction. In any event, the arbitrators' conclusion that MRB paid GPM conditionally is supported by the record. "In view of the overriding federal policy favoring arbitration, waiver is not lightly inferred." *Hart, supra*, 453 F.2d at 1360. In *Peterson v. Shearson/American Exp., Inc.*, 849 F.2d 464 (10th Cir. 1988), the court of appeals summarized the several factors to be considered in determining whether a party has waived its right to arbitration:

> (1) whether the party's action are inconsistent with the right to arbitrate; (2) whether "the litigation machinery has been substantially invoked" and the parties "were well into preparation of a lawsuit" before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of proceedings; (5) "whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken

> place"; and (6) whether the delay "prejudiced" the opposing party. (Citations omitted).

Id. at 467-468.

In short, MRB took no actions inconsistent with its right to arbitrate the dispute as to the occurrence of one or two storms. MRB did not file suit nor did it invoke the "litigation machinery" in any way prior to seeking arbitration. MRB informed GPM that its payments were conditionally made and were subject to repayment in arbitration.

GPM could have protected itself from the unfavorable result that occurred in this case. Rather than the course it chose, GPM could have sought to enjoin the arbitration hearing. *See Comprehensive Accounting Corp. v. Rudell,* 760 F.2d 138, 140 (7th Cir. 1985). At that time, GPM could have presented its arguments concerning K.S.A. 5-401 to the court. This course of action would have prevented MRB from unnecessarily incurring the expense of arbitration. Instead, GPM chose not to abide by its contractual agreement with MRB. GPM's *own* choice not to participate in the arbitration hearing precluded it from presenting evidence in support of its "one storm" theory.

In sum, the agreement between GPM and MRB contained a valid arbitration clause. Pursuant to that agreement, MRB sought arbitration. K.S.A. 5-401 and the McCarran-Ferguson Act did not operate to prevent the enforcement of the arbitration clause. Under the authority of the FAA, this court is compelled to confirm the arbitration award.

IT IS THEREFORE ORDERED that Mutual Reinsurance Bureau's motion for confirmation (Dk. # 1) is

GRANTED. The clerk is directed to enter judgment in favor of Mutual Reinsurance Bureau in the amount of $182,921.05.[8]

Great Plains Mutual Insurance Company's motion for consolidation, discovery and hearing (Dk. # 7) is denied.

Dated this 11th day of October, 1990, at Wichita, Kansas.

/s/ Sam A. Crow
Sam A. Crow, U.S. District Judge

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[8] This amount is derived from the arbitration agreement: the award of $142,500, plus $6,346.82 (fifty percent of the cost of arbitration), plus interest on both sums accruing at the prime rate quoted in the Wall Street Journal on January 2, 1989 (10.5%), plus two (2) percentage points (12.5%), compounded annually. According to the terms of the arbitration agreement, interest began to accrue on the award as of January 13, 1989; interest began to accrue on the arbitration costs as of February 11, 1989.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN THE MATTER OF
ARBITRATION OF MUTUAL
REINSURANCE BUREAU,

Claimant,

Case No.
89-1187-C

Vs.

GREAT PLAINS MUTUAL
INSURANCE COMPANY, INC.,

Respondent.

MEMORANDUM AND ORDER

(Filed Mar. 8, 1991)

This matter comes before the court upon Great Plains Mutual Insurance Company, Inc.'s, (GPM) motion to alter or amend. On October 11, 1990, this court issued an order confirming the arbitration award in favor of Mutual Reinsurance Bureau (MRB) in the amount of $142,500, plus interest. Judgment was entered in favor of MRB in the amount of $182,921.05.

GPM does not challenge the court's findings of fact. GPM, does, however, challenge the court's conclusions of law. As a general overview to GPM's motion to alter or amend, it is basically a rehashment of the same issues previously briefed by the parties. Those issues were addressed by the court in its October 11, 1990, order. In a motion to reconsider, the court has the opportunity to correct manifest errors of law or fact and to review newly discovered evidence. *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3rd Cir. 1985), *cert. denied*, 476 U.S. 1171 (1986). Appropriate circumstances for a motion to reconsider are

where the court has obviously misapprehended a party's position, the facts or the law, or mistakenly has decided issues outside of the issues presented for determination. *See refrigeration Sales Co. v. Mitchell-Jackson, Inc.*, 605 F. Supp. 6, 7 (N.D. Ill. 1983), *aff'd* 770 F.2d 98 (7th Cir. 1985). It is inappropriate for the movant to advance new arguments or supporting facts which were otherwise available for presentation when the original summary judgment motion was briefed. *Butler v. Sentry Ins. A. Mut. Co.*, 640 F. Supp. 806, 812 (N.D. Ill. 1986). The court, will, however, briefly address the arguments raised by GPM. For simplicity, the court will generally follow GPM's structuring of the arguments.

The McCarran-Ferguson Act

The McCarran-Ferguson Act is an unusual portion of federal law. The Act declares that state law regulating the business of insurance controls over federal law not specifically relating to the "business of insurance." The Act is an example of what might be properly termed "reverse-preemption." The court's discussion of the Act in its October 11, 1990, opinion, was included to provide a meaningful background in which to consider K.S.A. 5-401(c). GPM's discussion of the McCarran-Ferguson Act simply misapprehends the purpose of the court's overview of the Act.

Kansas Insurance Laws

GPM dedicates three pages to its discussion of Kansas statutes and case law concerning reinsurance. GPM contends that the Kansas legislature makes no distinction

between "reinsurance treaty" and "contracts for insurance" in the context of reinsurance in Chapter 40. While this may be accurate, GPM's argument falls wide of the mark. The issue presented by this case is whether the Federal Arbitration Act in this instance invalidates, impairs, or supersedes K.S.A. 5-401. The court concluded, after reviewing treatises on insurance and precedent from three federal circuits, including the tenth circuit, that the FAA did not invalidate, impair, or supersede K.S.A. 5-401. **The agreement of the parties is a "contract for insurance."**

GPM contends that the agreement with MRB is not titled a "contract for insurance." While that statement is correct, it has no bearing on the court's determination that the agreement is a reinsurance treaty or "contract for insurance." GPM has not previously, or in this motion to alter or amend, contended that the agreement was not, in substance, a reinsurance treaty, rather than a contract of insurance.

Arbitration

GPM contends that Kansas "takes the matter of the regulation of insurance business as one of considerable significance." GPM contends that this is the reason that the Kansas legislature prohibited arbitration of contracts of insurance in K.S.A. 5-401(c). In addition, GPM contends the court has ignored the rule of statutory construction that when a statute is plain and unambiguous the court must give effect to the intention of the legislature, rather than determine what the law should or should not be. GPM concludes this argument by stating that "with

such clear legislative history, the Kansas legislative had Kansas law in mind in enacting K.S.A. 5-401(c), not some state court decision from the State of Illinois."

GPM's arguments ignore several important considerations. K.S.A. 5-401 is capable of at least two possible interpretations; the interpretation advanced by GPM and the interpretation adopted by the court. If there is more than one reasonable interpretation of a statute, then that statute is ambiguous. If a statute is ambiguous, the court must attempt to discern the legislature's intent and resolve conflicting policies. In this case, the court concluded that enforcing the arbitration agreement did not conflict with K.S.A. 5-401. The legislature's inclusion of the phrase "contracts of insurance" is, in the court's opinion, included to prohibit arbitration of contracts between the insurance company and the insured. In any event, by its own terms, K.S.A. 5-401 does not apply to the reinsurance agreement in this case.

GPM's suggestion that the court has conjured the distinction between a reinsurance treaty and a contract of insurance from an obscure source which the Kansas legislature could not possibly have known is misplaced. The court has not latched onto a hypertechnical distinction; the distinction between a contract of insurance and a contract for insurance is a widely recognized distinction. *See Security Mut. Cas. Co. v. Century Cas. Co.*, 531 F.2d 974, 977 (10th Cir.), *cert. denied*, 429 U.S. 860 (1976); Jerry II, *Understanding Insurance Law*, at 684 (1987); 19 G. Couch, *Couch on Insurance* 2d § 80:2 (Rev. ed 1983). Moreover, the pervasiveness of congressional mandate compelling courts to enforce agreements to arbitrate is well-established.

The court notes that in its motion to alter or amend, GPM does not address any of the other factors the court considered in reaching its decision. First, GPM and MRB entered an agreement to arbitrate. In general, the court is inclined to enforce the contracts between sophisticated businesses by the terms of their agreement. *See Kansas City Structural Steel Co. v. L.G. Barcus & Sons, Inc.*, 217 Kan. 88, 95, 535 P.2d 419 (1975). Second, as noted above, the courts are swayed by the "ponderous mandate which declares that doubts as to the availability of arbitration must be resolved in favor of arbitration." *Life of America Ins. Co. v. Aetna Life Ins. Co.*, 744 F.2d 409, 413 (5th Cir. 1984). Finally, the result in this case could easily have been avoided if GPM had chosen to enjoin arbitration, rather than pursuing the course it chose.

Interest

GPM contends that the arbitrators exceeded the scope of their powers by awarding interest. GPM contends that the documents submitted by MRB to the arbitrators does not include any request for interest. GPM contends that because the arbitrators exceeded the scope of their powers, the court should vacate the award of interest under 9 U.S.C. § 10(d). In the event that the court does not vacate the award of interest, GPM contends that the court should reduce the amount awarded to reflect Kansas pre-judgment and post-judgment interest rates.

MRB responds that GPM is too late to argue either point. MRB contends that 9 U.S.C. § 12 requires GPM to serve the motion to modify upon the adverse party within three months after the award is filed or delivered.

MRB contends that its failure to serve the motion bars GPM's assertion of the defenses found in 9 U.S.C. § 10(d) and 9 U.S.C. § 11(b).

The court notes that GPM raises these issues concerning the award for interest for the first time in this motion to alter or amend. In any event, the court concludes that GPM's failure to serve the motion to vacate, modify or correct an award upon the adverse party bars the assertion of these defenses. *See Brotherhood of Teamsters v. Celotex Corp.*, 708 F.2d 488, 490 (9th Cir. 1983) (party's failure to petition to vacate an unfavorable award within the applicable statutory period bars the party from asserting affirmative defenses in a subsequent proceeding to confirm the award); *Sheet Metal Workers International Association, Local 252 v. Standard Sheet Metal, Inc.*, 699 F.2d 481 (9th Cir. 1983) (unsuccessful party at arbitration who did not move to vacate the award within the prescribed time may not subsequently raise, as affirmative defenses in a suit to enforce the award, contentions that it could have raised in a timely petition to vacate the award); *Florasynth, Inc. v. Pickholz*, 598 F. Supp. 17 (S.D.N.Y. 1984). GPM's motion to attack the award for interest is barred by 9 U.S.C. § 12.

IT IS THEREFORE ORDERED that GPM's motion to alter or amend (Dk. 28) is denied.

Dated this 8th day of March, 1991, at Wichita, Kansas.

/s/ Sam A. Crow
Sam A. Crow,
U.S. District Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IN THE MATTER OF THE ARBITRATION OF MUTUAL REINSURANCE BUREAU,	)	
Claimant - Appellee,	)	No. 91-3119
v.	)	
GREAT PLAINS MUTUAL INSURANCE COMPANY, INC.,	)	
Respondent - Appellant.	)	

ORDER
Filed August 11, 1992

Before McKAY, SETH, ALDISERT*, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL and KELLY, Circuit Judges.

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*The Honorable Ruggero J. Aldisert, United States Circuit Judge for the Third Circuit Court of Appeals, sitting by designation.

This matter comes on for consideration of appellee's petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by the panel of judges who rendered the decision sought to be reheard.

In accordance with Rule 35(b) of the Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to the members of the panel and to all the judges of the court in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

By: Patrick Fisher
Patrick Fisher
Chief Deputy Clerk